

1986

The State of Utah v. Lane B. Halverson : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 860249-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintff-Respondent.	:	Case No. 860249-CA
	:	
vs.	:	
	:	
LANE B. HALVERSON,	:	Priority 2
	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF CONTEMPT OF COURT
IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND
FOR DUCHESNE COUNTY, STATE OF UTAH, THE
HONORABLE RICHARD C. DAVIDSON, PRESIDING

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATUTORY PROVISIONS.....	2
STATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	
POINT I JUDGE DAVIDSON'S ACTION IN SERVING AN ORDER TO SHOW CAUSE RE CONTEMPT ON ATHAY AND GIVING HIM A HEARING WHERE HE WAS REPRESENTED BY COUNSEL OBSERVED HIS DUE PROCESS RIGHTS.....	3
CONCLUSION.....	5
APPENDICES.....	7

TABLE OF AUTHORITIES

CASES CITED

<u>Chula v. Superior Court of Orange County</u> , 57 Cal. 2d 199 368 P.2d 107) (1902).....	5
<u>In re Yengo</u> , 84 N.J. 111, 417 A.2d 533, <u>cert. denied</u> 449 U.S. 1124.....	5
<u>Re Contempt of Potter</u> , 207 Neb. 769, 301 N.W.2d 560 (1981).....	5
<u>Robinson v. City Court of Ogden</u> , 112 Utah 36, 185 P.2d 256 (1947).....	4

STATUTES AND RULES

Utah Code Ann. § 78-32-3 (1987).....	1,4
Utah Code Ann. § 78-39-9 (1987).....	1,4

IN THE UTAH COURT OF APPEALS

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Plaintiff-Respondent.	:	Case No. 860249-CA
	:	
vs.	:	
	:	
LANE B. HALVERSON,	:	Priority 2
	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant, D. Gilbert Athay, was adjudged in contempt of court for being absent from trial in the Seventh District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATUTORY PROVISIONS

Utah Code Ann. § 78-32-3

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in § 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

Utah Code Ann. § 78-32-4

When the contempt is not committed in the immediate view and presence of the court or judge a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

Utah Code Ann. § 78-32-9

When the person arrested has been brought up or has appeared the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him; for which an adjournment may be had from time to time, if necessary.

STATEMENT OF THE ISSUES

Whether an order to show cause and a hearing before a judge where the contemner has the opportunity to answer charges satisfies due process where the conduct held in contempt is an attorney's absence from court.

STATEMENT OF THE NATURE OF THE CASE

Upon the court's instructions, the Duchesne County Attorney served upon D. Gilbert Athay an Order to Show Cause in re: Contempt for his absence from trial. After a hearing before Judge Richard C. Davidson, the court found Athay in contempt and fined him \$300.00.

STATEMENT OF FACTS

D. Gilbert Athay represented Lane Halverson in a criminal matter. The court initially scheduled Halverson's trial for April 1, 1986 but rescheduled it for May 13, 1986 when neither attorney could attend the earlier date (R. 9). On May 9, Athay's secretary called the court and tried to continue the May 13 trial date, saying that Athay was out of the country and could not return in time for the trial (R. 25).

The judge denied the continuance and proceeded to assemble the jury panel on May 13, but when it became clear that Athay would not arrive, the judge excused the panel and instructed the county attorney to prepare an order to show cause in re: contempt to be delivered to Athay (R. 25).

The order (R. 26) required Athay to attend a hearing on June 30, 1986 to show cause why he should not be punished. Athay did not appear at the hearing and the court rescheduled for July 14, 1986. Athay and his counsel attended this hearing where the court gave them an opportunity to explain Athay's absence. Nevertheless, the court found Athay in contempt and fined him \$300.00 in partial deferral of the cost to the state for assembling a jury. The judge also invited counsel to appeal the case and stayed execution of the sentence for six months.

SUMMARY OF ARGUMENT

Judge Davidson did not use summary proceedings to find Athay in contempt. Rather, he gave him notice of the charges and a hearing to answer the charges in full observance of his due process rights. Athay already received the relief he is requesting.

ARGUMENT

JUDGE DAVIDSON'S ACTION IN SERVING AN ORDER TO SHOW CAUSE RE CONTEMPT ON ATHAY AND GIVING HIM A HEARING WHERE HE WAS REPRESENTED BY COUNSEL OBSERVED HIS DUE PROCESS RIGHTS

In his brief, Athay states that the issue in this case is whether an attorney's absence from trial is contempt within the immediate presence of the court, and, thus, punishable by summary proceedings. Athay argues that the lower court used summary proceedings to find him in contempt, that his absence from trial was not within the immediate presence of the court and, therefore, the judge denied him his due process rights.

The record shows however, that Athay misstated the issue. This court need not decide whether Athay's contemptuous

conduct deserved summary adjudication. Even though the court found that it held Athay in contempt without a hearing (R. 18), the court did not, in fact, use its summary power but respected Athay's due process rights. Athay received notice through an order to show cause and attended a hearing where he was allowed to explain his absence and proffer evidence.

Utah Code Ann. §78-32-3 (1987) provides that when a person acts with contempt outside the presence of court (indirect contempt), an affidavit or statement of facts must initiate the contempt proceeding. However, when a person acts with contempt in the presence of the court (direct contempt), a judge may act summarily in finding him guilty of contempt.

To find a person guilty of indirect contempt, not only must a court officer bring an affidavit against the accused, but also, the court must give the accused notice of the charges against him, Robinson v. City Court of Ogden, 112 Utah 36, 185 P.2d 256 (1947), and the opportunity to answer the charges, Utah Code Ann. § 78-32-9 (1987).

The county sheriff served Athay with the Order to Show Cause in re: Contempt on May 27, 1986 (R. 25). See Utah Code Ann. § 78-32-4 (1987). This order specified the contemptuous conduct as being Athay's absence from court on May 13, 1986 and ordered him to appear in court and show cause why he should not be held in contempt on June 30, 1986. The clerk of the court filed an affidavit supporting the charge (R. 18).

Athay did not appear for this hearing and a temporary judge issued a bench warrant for his arrest (R. 39). Judge

Davidson later recalled this warrant (R. 40) and set the hearing for July 14. At this hearing, Athay had the opportunity to answer the contempt charge, nevertheless, the judge found him in contempt and fined him \$300.00.

The judge acted in line with the procedure required for contempt outside the presence of the court. Indeed, contrary to Athay's contention, the judge respected Athay's constitutional rights. He satisfied every necessary step in the formal contempt process. His actions are in line with recent decisions from other state's appellate courts in analogous situations where orders to show cause and opportunities to answer charges have been used in cases involving contempt for an attorney's absence from a scheduled court date. Chula v. Superior Court of Orange County, 57 Cal. 2d. 199, 368 P.2d 107 (1962); Re Contempt of Potter, 207 Neb. 769, 301 N.W.2d 560 (1981); In Re Yengo, 84 N.J. 111, 417 A.2d 533 (1980) cert. denied 449 U.S. 1124.

Athay argues that he was not afforded due process because the court did not take evidence. The question here is what process was due to Athay. Section 78-32-9 requires only that the court must hear any answer the contemner may offer. It further states, however, only that the court may examine witnesses. Thus, when the court found that an evidentiary hearing was unnecessary, it acted within the due process rights provided by Utah for a contempt proceeding. It is clear from the record that the court was aware from the hearing of the reasons for Athay's failure to appear, but that the court found them unpersuasive. Having Athay and his secretary sworn would not

have added any weight to Athay's reasons for his absence from trial and he was not prejudiced by the court's decision not to hear evidence where argument was heard.

CONCLUSION

Because Athay has already received notice and a hearing, the State requests this court to affirm the judgment of contempt and the imposition of the \$300 costs.

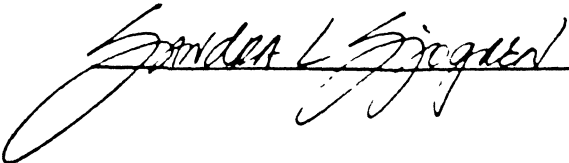
DATED this 22nd day of January, 1988.

DAVID L. WILKINSON
Attorney General


SANDRA L. SJOGREN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 22nd day of January, 1988, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing Brief of Respondent to Bradley P. Rich, 175 East 200 South, Suite 400, Salt Lake City, Utah 84111.



APPENDIX A

IN THE SEVENTH JUDICIAL DISTRICT COURT
in and for Duchesne County
of the State of Utah

STATE OF UTAH

CRIMINAL MINUTE ENTRY

VS.

Case No. 86-CR-29-D, 30-D and
31-D

Lane Brian Halverson

Date: May 13, 1986

Judge: Richard C. Davidson

Defendant

Court Reporter: Milo Harmon

Crime: Burglary
Theft
Theft

Classification: Second
Second (16 Counts)
Second

COUNSEL FOR STATE: Dennis L. Draney, county attorney.
COUNSEL FOR DEFENDANT: Gilbert Athay (Not Present).

PROCEEDINGS BEFORE THE COURT: Jury Trial.

This was the time set for trial. Defense counsel did not appear. Court advised the jury that Mr. Athay had not appeared. He thanked them for coming.

After the jury was excused the Court made a record that on March 10, 1986 the defendant was brought before the Court for arraignment. On March 19, 1986 notice was sent to counsel advising that trial had been set for April 1st and 2nd and with alternate dates of May 13, and 14th. On April 1st, 1986 at the time that this matter had been set for trial and it was decided at this time to continue the trial to May 13.

On May 9, 1986 the Court received a phone call from Mr. Athay's secretary requesting a continuance of the trial, which was denied.

Mr. Draney advised the Court that his office had been contacted with no reason why counsel should not be in attendance today.

The Court contacted Mr. Roland Uresk and had him talk with the defendant. At 9:55 A.M. the Court finds that Mr. Athay is in contempt of the Court and orders the county attorney to prepare an order to show cause and have Mr. Athay served with the same. The affidavit to contain the expenditures for the jury and the witnesses.

Court appoints Roland Uresk to represent defendant in a bond hearing set for May 14, 1986 at 9:30 A.M. Mr. Uresk to also represent defendant in any plea negotiating that may occur.

Roger K. Maret - Clerk

FILED
IN DISTRICT COURT DUCHE
UTAH

MAY 19 1986

ROGER K. MARETT Clerk

CS

APPENDIX B

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FILED
7th DISTRICT COURT DUCHESNE
STATE OF UTAH

1986 JUL 15

ROGER K. MARETT, Clerk

By CS Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
)	
Plaintiff,)	FINDINGS OF FACT
)	AND
vs.)	CONCLUSIONS OF LAW
)	
LANE B. HALVERSON,)	Case Nos. 86 CR 29D
)	86 CR 30D
Defendant.)	86 CR 31D
)	
)	

The above matter came on for hearing before Judge Richard C. Davidson, District Court Judge on July 14, 1986. The State was represented by Dennis Draney, Duchesne County Attorney and D. Gilbert Athay, attorney at law, was present pursuant to an Order to Show Cause in Re Contempt and was represented by Bradley P. Rich. The court having heard argument of counsel and being fully advised, now makes and enters the following:

FINDINGS OF FACT

1. The court had previously found without a hearing that D. Gilbert Athay was in contempt; the clerk having previously filed an affidavit and the county attorney having charged the specifics of the contempt allegation. This was done pursuant to Utah Code Annotated §78-32-3.

2. The court made and entered its Order of Contempt without any prior notice to contemner and without hearing any evidence. The court based its decision upon the failure of contemner to appear at the time previously set for trial of the above captioned action.

3. The court deems it unnecessary to hear evidence regarding this type of contempt hearing.

From the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

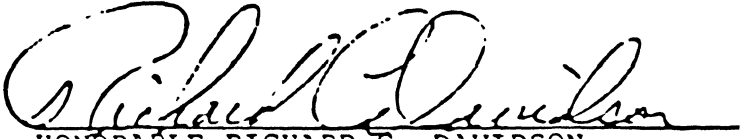
1. The contemner was in willful contempt and liable to the court for the sum of \$300 for trial costs incurred herein.

2. The court urges contemner and his counsel to appeal the matter to the Supreme Court of the State of Utah.

3. Costs assessed in the matter will be stayed for a period of six months pending outcome of the appeal to the Supreme Court.

DATED this 29 day of August, 1986.

BY THE COURT:


HONORABLE RICHARD C. DAVIDSON
District Court Judge